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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 97-128
	)	
MARTIN W. HOFFMAN,	)	
Trustee-in-Bankruptcy for Astroline	)	File No. BRCT-881201LG
Communications Company Limited	)	
Partnership	)	
	)	
For Renewal of License of	)	
Station WHCT-TV, Hartford, Connecticut	)	
	)	
SHURBERG BROADCASTING OF HARTFORD	)	File No. BPCT-831202KF
	)	
For Construction Permit for a New	)	
Television Station to Operate on	)	
Channel 18, Hartford, Connecticut	)	

TO: Magalie Roman Salas, Secretary  
for direction to  
The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

REPLY TO OPPOSITION TO REQUEST FOR ORAL ARGUMENT

1. Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("SBH") hereby replies to the Opposition of the Mass Media Bureau ("Bureau") to SBH's Request for Oral Argument in the above-captioned proceeding.

2. In its Request, SBH pointed out that the claim of Astroline Communications Company Limited Partnership ("ACCLP") to being a minority-owned/controlled entity -- and therefore to qualifying for specialized treatment under the Commission's then-operative minority distress sale policy -- is absolutely central to this case. The Bureau appears to agree. See Bureau Opposition at 2.<sup>1/</sup> But resolution of that question necessarily requires clear

<sup>1/</sup> "At issue in this case is whether or not ACCLP made misrepresentations to the Commission and the federal courts concerning its status as a minority-controlled entity."

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articulation of what (if any) definitional "standards" the Commission applied to minority-owned/controlled entities. This is, of course, dictated not only by logic, but also by the Constitution, which imposes extraordinarily demanding burdens on governmental bodies which engage in race-based decision-making. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Resolution of that central question also requires detailed evaluation of ACCLP's actual structure -- not merely as it was presented in June, 1984, but as it evolved, formally and otherwise, while ACCLP's application remained pending. <sup>2/</sup>

3. The ACCLP assignment application was pending before the Commission from mid-1984 through September, 1990. Throughout that period the Commission refined its own standards for minority-ownership and control. Also throughout that period, ACCLP itself modified its own structure in multiple material respects which were *INCONSISTENT* with the Commission's original standards and with the Commission's refined standards. Despite that, ACCLP continually held to the claim that it really was a minority-owned/controlled entity within the meaning of the Commission's policies. Importantly, ACCLP never bothered to advise the Commission of the formal and informal changes which were occurring within its structure; indeed, despite the fact that ACCLP was specifically required to do so in August, 1987 <sup>3/</sup>, and *KNEW* that it was required to do, and was in a position to do so, ACCLP

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<sup>2/</sup> This assumes, *arguendo*, that a non-individual entity (*e.g.*, partnership, corporation, etc.) can legitimately be deemed, for Constitutional purposes, to have some "racial" characteristic sufficient to support race-based governmental decision-making. See SBH Request for Oral Argument at n. 4.

<sup>3/</sup> Since the ACCLP application was pending from 1984-1990, ACCLP was in any event under a continuing obligation to notify the Commission of changes in the information on file. Section 1.65 of the Commission's Rules. The reference to August, 1987, relates to a separate obligation to submit a complete Ownership Report (FCC Form 323) and related documents on August 3, 1987. The record evidence conclusively establishes that ACCLP was aware of that obligation, that it had prepared such a report, but that that report was not filed after concerns about the "implications" of its report were raised. The report as prepared indicated that ACCLP was *not* an "insulated" limited partnership.

(continued...)

declined to provide the Commission with such information in August, 1987. For its part, the Commission continually advised the Courts (including the Supreme Court) that the Commission was really scrutinizing entities which claimed minority status.

4. The Bureau's Opposition ignores all of that. According to the Bureau, all the Commission needs to worry about is that ACCLP's supposedly controlling minority individual "reasonably believed that he was in control." Bureau Opposition at 3. But such a subjective approach is clearly inconsistent with the Commission's obligations under *Adarand*. The question cannot be whether a party claiming minority status sincerely believes itself qualified for preferential treatment because of its race -- such an approach would make a mockery of *Adarand* and the Constitutional limitations on race-based governmental decision-making. Rather, the question must be whether that party in fact objectively satisfies the agency's standards.

5. The Bureau also claims that there is no record evidence that ACCLP intended to deceive the Commission and the courts. With all due respect, the Bureau appears to have missed a considerable portion of this proceeding. The documentary evidence plainly demonstrates that: ACCLP knew that it did not satisfy the Commission's standards for "insulated" limited partnerships; ACCLP knew that it was obligated to report that to the Commission; ACCLP elected not to report that to the Commission, apparently because of certain "implications". See, e.g., SBH Exhs. 88,89; SBH Exceptions at 18-19. <sup>4/</sup> The

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<sup>3/</sup>(...continued)

Instead of filing the report, ACCLP submitted a letter "in lieu of" a report; in that letter ACCLP failed to address its non-insulated status, and it also failed to submit a copy of ACCLP's then-current partnership agreement. No witness was able to provide any rational justification for those omissions.

<sup>4/</sup> The Bureau acknowledges ACCLP's omissions, but inexplicably declines to address them. Bureau Opposition at n. 1.

evidence also demonstrates that ACCLP knew that the supposedly controlling minority individual was supposed to own at least 20% of ACCLP; but from 1985-1988, ACCLP reported to the Internal Revenue Service that that individual in fact owned significantly less than 1% of ACCLP. *See, e.g.*, SBH Exceptions at 13-14.

6. The Bureau accuses SBH of "clouding the issue" by alerting the Commission to the important Constitutional issues which plainly underlie this case. Bureau Opposition at 2. But it is the Bureau, not SBH, which seeks to distract attention from the real issue here. From 1984-1990, ACCLP held itself out as qualified for a race-based governmental policy. As the Supreme Court emphasized in *Adarand* -- and as was seconded in *Lutheran Church - Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) -- all governmental action based on race must be subjected to detailed scrutiny. *E.g.*, 515 U.S. at 226.

7. Where, as here, the agency's "scrutiny" of a claim of minority entitlement was essentially non-existent, and where, as here, the evidence clearly demonstrates that the claimant could not satisfy the then-applicable standards, and where, as here, the agency's failure to undertake the Constitutionally-required scrutiny was due in large part to the fact that the claimant withheld relevant information from the Commission, the Constitutional validity of the underlying actions is clearly in question.

8. The Bureau's struthious suggestion that there is no Constitutional question here is reminiscent of the Commission's own novel -- and unsuccessful -- effort to convince the Court of Appeals that the Commission's former EEO rules did not constitute race-based decision-making subject to the *Adarand* standards. *See Lutheran Church, supra*. While the Bureau might prefer to attempt to avoid further scrutiny of the Commission's minority ownership policies simply by claiming that those policies do not raise Constitutional questions,

such scrutiny cannot and will not be avoided. Indeed, the more that the Bureau (and the Commission) try to sidestep their *Adarand* obligations, the more credible is the suggestion that they are unwilling or unable to recognize and honor those Constitutional obligations in *any* context.

9. If the Commission truly understands its obligations under *Adarand*, the Commission must recognize that the Constitution demands maximum scrutiny and deliberation when the government, as here, attempts to hand out benefits on the basis of race, with some races eligible for such benefits while others are flatly excluded. The Commission must also recognize that the Bureau's position flies in the face of those Constitutional demands. Indeed, the Bureau's strident effort to direct the Commission away from the obvious Constitutional issues central to this case itself argues strongly in favor of oral argument here. Endorsement of the Bureau's effort (and consequent denial of oral argument) by the Commission would signal to the Courts that the Commission is still seeking (as it did in *Lutheran Church*) to ignore Constitutional standards.

Respectfully submitted,



/s/ Harry F. Cole  
Harry F. Cole

Bechtel & Cole, Chartered  
1901 L Street, N.W. - Suite 250  
Washington, D.C. 20036  
(202) 833-4190

Counsel for Shurberg Broadcasting of Hartford

July 20, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of July, 1999, I caused copies of the foregoing "Reply to Opposition to Request for Oral Argument" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following:

The Honorable William Kennard  
Chairman  
Federal Communications Commission  
445 12th St., S.W. - Room 8-B201  
Washington, D.C. 20554  
(BY HAND)

The Honorable Susan Ness  
Commissioner  
Federal Communications Commission  
445 12th St., S.W. - Room 8-B115  
Washington, D.C. 20554  
(BY HAND)

The Honorable Harold Furchtgott-Roth  
Commissioner  
Federal Communications Commission  
445 12th St., S.W. - Room 8-A302  
Washington, D.C. 20554  
(BY HAND)

The Honorable Michael Powell  
Commissioner  
Federal Communications Commission  
445 12th St., S.W. - Room 8-A204  
Washington, D.C. 20554  
(BY HAND)

The Honorable Gloria Tristani  
Commissioner  
Federal Communications Commission  
445 12th St., S.W. - Room 8-C302  
Washington, D.C. 20554  
(BY HAND)


John I. Riffer  
Assistant General Counsel  
Office of General Counsel  
Federal Communications Commission  
445 12th St., S.W. - Room 8-A660  
Washington, D.C. 20554  
(BY HAND)

Peter D. O'Connell, Esquire  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
Counsel for Martin W. Hoffman,  
Trustee-in-Bankruptcy for  
Astroline Communications Company  
Limited Partnership

Howard A. Topel, Esquire  
Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Suite 600  
Washington, D.C. 20036  
Counsel for Two If By Sea  
Broadcasting Corporation

Kathryn R. Schmeltzer, Esquire  
Fisher, Wayland, Cooper, Leader  
& Zaragoza L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006-1851  
Counsel for Richard P. Ramirez

James Shook, Esquire  
Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
445 12th St., S.W. - Room 3-A463  
Washington, D.C. 20554  
(BY HAND)

  
/s/ Harry F. Cole  
Harry F. Cole